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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 855

HC&D MOVING & STORAGE COMPANY, INC.,
a Hawaii corporation;
CITY TRANSFER COMPANY, LTD., a Hawaii corporation;
Y. HIGA ENTERPRISES, LTD., a Hawaii corporation;
and
HAWAIIAN HAULING SERVICES, LTD.,
a Hawaii corporation, *Appellants,*

v.

HAROLD YAMANE, State Tax Collector,
First Taxation Division, *Appellee.*

On Appeal From the Supreme Court of the State of Hawaii

JURISDICTIONAL STATEMENT

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OPINION BELOW

The decisions of the trial court are not reported. The opinion of the Supreme Court of the State of Hawaii, affirming the judgment below is reported at 48 Hawaii 486 (1965). Copies of the opinion and judgment are attached as an Appendix.

JURISDICTION

This appeal challenges the judgment of the Supreme Court of the State of Hawaii upholding a state gross receipts tax imposed upon the privilege of engaging in interstate commerce.

The action was brought under Revised Laws of Hawaii 1955, Section 34-24, for the recovery of the tax levied and collected pursuant to Chapter 117, Revised Laws of Hawaii 1955, here challenged as unconstitutional as applied in this case.

The Supreme Court of the State of Hawaii in its opinion rendered August 4, 1965, upheld the validity of the tax and entered judgment August 16, 1965. Notice of appeal was filed November 3, 1965.

Jurisdiction is conferred on this Court by 28 U.S.C., Sections 1257(2) and 2101(c), and is sustained by *Railway Express Agency* v. *Virginia,* 347 U.S. 359 (1954); *Mich.-Wis. Pipe Line Co.* v. *Calvert,* 347 U.S. 157 (1954); *General Motors* v. *Washington,* 377 U.S. 436 (1964).

QUESTIONS PRESENTED

1. Is a state tax on the privilege of doing an interstate commerce business measured by the gross receipts thereof valid under the Commerce Clause of the United States Constitution, Article I, Section 8?

2. Is an unapportioned state tax on the privilege of doing an interstate commerce business measured by the entire gross receipts therefrom valid under the Commerce Clause of the United States Constitution, Article I, Section 8?

3. Is a state tax on the privilege of doing an interstate commerce business measured by the gross receipts

thereof and levied against taxpayers who were engaged solely in an interstate commerce business valid under the Commerce Clause of the United States Constitution, Article I, Section 8?

STATUTES INVOLVED

Chapter 117, Revised Laws of Hawaii 1955, and particularly the following portions of Section 117-14, Revised Laws of Hawaii 1955:

> Imposition of tax. There is hereby levied and shall be assessed and collected annually privilege taxes against persons on account of their business and other activities in the Territory measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as follows:
>
> * * *
>
> (f) Tax on service business. Upon every person engaging or continuing within the Territory in any service business or calling not otherwise specifically taxed under this chapter, there is likewise hereby levied and shall be assessed and collected a tax equal to two and one-half per cent of the gross income of any such business.

(The effective rate at the time of assessments was amended by Section 3(q) of Act 1 of the Special Session Laws of Hawaii 1957 to three and one-half per cent.)

STATEMENT

The testimony with respect to Overseas Van, Limited, and HC&D Moving & Storage Company, Inc. (Nos. 9476 and 10562) appears in Exhibit B and the exhibits thereto attached and in Exhibits N and O. Briefly stated, Overseas Van (subsequently merged

into HC&D Moving & Storage Company, Ex. B, p. 3), was assessed $50,516.81 for 1958, 1959 and 1960. In cooperation with main land carriers it handled in Hawaii shipments originating and terminating in Hawaii on through bills of lading issued by the carrier (Ex. B. p. 5).

Upon originating shipments, Overseas Van would document the shipment with the carrier's bill of lading, go to the residence, pack the furniture and accessories into a sea van or through container, transport the container to the pier and arrange for transportation to the mainland by steamship and prepare the necessary documents (Ex. B, pp. 6-7).

On in-bound shipments the taxpayer received the carrier's through bill of lading and the government bill of lading and a notice of arrival from the steamship company. It picked up the cargo when it was unloaded and transported it to the point of destination. If the consignee had no residence, the goods were moved into storage called "storage in transit" and held until the consignee gave notice of his residence. The goods were then delivered to the residence and unpacked, at which time the consignee signed a receipt (Ex. B, pp. 7, 8, 13).

With respect to accessorial charges for packing, crating and cleaning on both ends of the shipment, in the beginning Overseas Van received eighty per cent of these charges made to the consignee on out-bound shipments and twenty per cent of the charges on in-bound shipments. With respect to the ocean freight, after deduction of actual ocean freight charged the mainland carrier by the steamship company, the taxpayer received seventy per cent of the out-bound ocean freight override and thirty per cent of the in-bound

ocean freight override (Ex. B, p. 9). At a later date this arrangement was changed to a flat payment per hundred weight of the goods moved and this payment included accessorial charges (Ex. B, pp. 10-11).

In addition, the taxpayer received all charges for storage in transit and delivery out of it (Ex. B, pp. 11-12). The mainland carrier would collect from the consignee or the government, as the case might be and remit to the taxpayer its share of the proceeds (Ex. B, p. 14). The taxpayer's only business was that of acting for van line companies and freight forwarding companies engaged in moving household goods for military personnel and civilians on through bills of lading to and from Hawaii and the mainland United States and other parts of the world on occasion (Ex. B, p. 4).

With respect to HC&D Moving & Storage, it took over the business of the division of Honolulu Construction and Draying Company of the same name which operated it theretofore (Tr. 19). In 1959 and in 1960 it, like Overseas Van, engaged only in the particular household goods interstate business involved in this appeal. In 1961 it also did some local hauling (Ex. B, p. 18). The services it performed were the same as those performed by Overseas Van but it was compensated according to a number of different arrangements (Ex. B, pp. 18-24).

City Transfer Company, Ltd., as agent for Aero-Mayflower Transit Company, performed the same type of services as were performed by Overseas Van and HC&D Moving & Storage Company, Inc., for the respective carriers with which they had arrangements. These shipments were handled on a through bill of lading in the same manner, although the arrange-

ments for compensation varied somewhat (Ex. C, pp. 3-20).

Y. Higa Enterprises, Ltd., with respect to the assessment herein questioned, performed the same services as the other taxpayers with respect to their assessments. It represented a number of different carriers (Tr. 3-9).

The situation as to Hawaiian Hauling Services, Ltd., is somewhat different. That company handled mostly commercial goods store door to store door (Ex. A, p. 10). This was done under arrangements with Emory Air Freight, an air freight forwarder, and two surface freight forwarders, Hawaii Consolidators of Los Angeles and Hawaiian Express of San Francisco (Ex. A, p. 4). However, the goods were handled on through bills of lading and run store door to store door (Ex. A, pp. 10-11). Roughly the same services were performed as in the case of the other taxpayers with respect to household goods (Ex. A, pp. 8-9).

City Transfer and Y. Higa Enterprises, Ltd., were engaged in both local haulage and the household goods through bill of lading business (Ex. C and D). Hawaiian Hauling was engaged in local haulage and the store door to store door through bill of lading business (Ex. B). Overseas Van, Limited, was engaged exclusively in the interstate household goods shipment business. The same was true of HC&D Moving & Storage Company, Inc., itself in the years 1959 and 1960, but in 1961 it engaged in a certain amount of local haulage (Ex. B). All used through bills of lading in all interstate shipments.

The assessments in question ran against all receipts by the respective taxpayers from the through bill of lading business.

With respect to each of the five assessments here involved, the assessed appellant taxpayer paid the taxes under protest, setting up as the ground for protest the claim of invalidity of the assessment and the taxing statute as a burden on interstate commerce. Each appellant filed a complaint in the Circuit Court of the First Circuit, State of Hawaii, raising the same contention, all pursuant to Section 34-24, Revised Laws of Hawaii 1955. The Circuit Court of the First Circuit in each case upheld the validity of the assessment and the tax against the contention that the assessment and tax were unconstitutional under the Commerce Clause of the United States Constitution. An appeal was timely taken to the Supreme Court of the State of Hawaii, which affirmed the judgment below. From the judgment of the Supreme Court of the State of Hawaii this appeal was taken.

The appellants contended at every stage of the proceedings that Section 117-14, Revised Laws of Hawaii 1955 as amended, is repugnant to the Constitution of the United States and invalid in that it constitutes a burden upon interstate commerce. The constitutional questions were raised in the trial court by the complaints (R. 3-43) and also in the Supreme Court of Hawaii. The constitutional questions were considered but rejected both by the trial court (R. 53-92) and the Supreme Court of Hawaii (R. 104-132).

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents important constitutional questions involving state taxes on the privilege of doing business in interstate commerce measured by the unapportioned gross receipts therefrom. The decision of the Supreme Court of Hawaii upholding the validity of the tax in this case rejects the settled constitutional

principle that a state may not levy a tax measured by gross receipts upon the privilege of doing an interstate commerce business. Under the decisions of this Court, the tax in question is unconstitutional.

1. In *Interstate Pipe Line Co.* v. *Stone,* 337 U.S. 662 (1949), a privilege tax was upheld on gross receipts derived from shipments within a state in the course of interstate commerce. Four justices held that whether or not interstate commerce was involved the tax was fairly apportioned and hence valid. Four justices held that interstate commerce was involved and the tax was invalid. One justice held that interstate commerce was not involved. In the present case, since there were through bills of lading in the case of each shipment, it is obvious that interstate commerce is involved. Accordingly, the point undecided in *Interstate Pipe Line Co.* v. *Stone, supra,* is squarely presented here.

2. The activities of crating, packing, delivery and storage in transit within the State of Hawaii under through bills of lading are clearly a part of interstate commerce under the decisions of this Court in *Spector Motor Service* v. *O'Connor,* 340 U.S. 602 (1951), and *Railway Express Agency* v. *Virginia,* 347 U.S. 359 (1954).

3. This is a privilege tax on the privilege of doing an interstate business as clearly appears from the opinion of the Supreme Court of the State of Hawaii stated:

> . . . It is readily seen that the tax by its express terms is a privilege tax upon engaging or continuing within the State in any service business and is measured by the gross income of such business. . . . . Here the operating incidence of the tax

> is on the privilege of doing business in Hawaii measured by the gross income received therefrom. . . . (48 Hawaii 486, 490)

and again,

> . . . In support of their chief contention taxpayers maintain that "the business taxed is interstate commerce" and again that "the shipments of goods here involved are in interstate commerce." Viewed in the light of the principal contract between the consignor and the mainland carrier, the shipments involved the transportation of goods from a place in one state to a place in another which bring them within the realm of interstate commerce. . . . (48 Hawaii 491)

This Court has repeatedly stated that a state may not lay a tax on the privilege of engaging in interstate commerce. *General Motors Corporation* v. *Washington* 377 U.S. 436, 446 (1964); *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 US. 450 (1959).

4. Here one of the taxpayers throughout the assessment period (Overseas Van, Limited, later merged into HC&D Moving & Storage Company, Inc.), and another, through most of the assessment period (HC&D Moving & Storage Company, Inc.) engaged only in this interstate commerce business. The other taxpayers engaged in other business activities within the State of Hawaii but conducted what is in effect a separate operation with respect to the business in question. Each taxpayer handled shipments only on through bills of lading and the services rendered were all part of the services called for and paid for under the through bills of lading. In the case of HC&D Moving & Storage Company, Inc., Overseas Van, Limited, City Transfer Company, Ltd., and Y. Higa Enterprises, Ltd., the

shipments hauled under through bills of lading were household goods and were almost all for military personnel. In the case of Hawaiian Hauling Services, Ltd., the shipments involved commercial goods, but in each case the business engaged in was a distinct and separable business activity.

5. The facts in the case in question show that the tax was levied on the taxpayers' entire receipts from the shipment even though those receipts themselves were larger than the amounts paid by the consignee for the services rendered in Hawaii. No attempt was made to apportion the receipts in any manner, and in fact, since the taxpayers each engaged in business only in Hawaii, any apportionment was expressly forbidden by the provisions of Section 117-18, Revised Laws of Hawaii 1955 as amended, which reads in part as follows:

> Apportionment. If any person, other than persons liable to the tax on manufacturers as provided by subsection (a) of section 117-14, is engaged in business both within and without the State or in selling goods for delivery outside the State, and if under the Constitution or laws of the United States the entire gross income of such person cannot be included in the measure of this tax, there shall be apportioned to the State and included in the measure of the tax that portion of the gross income which is derived from activities within the State, to the extent that such apportionment is required by the Constitution or laws of the United States. . . .

6. This case is distinguishable from *General Motors* v. *Washington,* 377 U.S. 436 (1964), in that the tax there involved, while similar in wording to the tax here, was a tax on engaging in the in-state activity of conducting business within the State of Washington

whereas the tax in this case, as construed by the Supreme Court of Hawaii, is a tax on the privilege of engaging in a service business and the service business in question has been held by the Supreme Court of Hawaii to be interstate commerce. Thus the Supreme Court of Hawaii in effect has held that a tax on the privilege of engaging in interstate commerce may constitutionally be levied. This is a misinterpretation of *General Motors Corporation* v. *Washington, supra,* and if allowed to stand, will have far-reaching consequences with respect to other states since the states can then by taxation regulate interstate commerce.

7. The fact that the taxpayers here involved were all Hawaii corporations does not change the result in this case. In *Puget Sound Co.* v. *Tax Commission,* 302 U.S. 90 (1937), a tax on the privilege of engaging in interstate commerce was struck down even though the corporation involved was a domestic corporation. Compare also *Greyhound Lines* v. *Mealey,* 334 U.S. 653 (1948), and *Adams Mfg. Co.* v. *Storen,* 304 U.S. 307 (1938), in which state taxes were held invalid as burdens on interstate commerce even though the corporations were domestic corporations.

8. We think it plain that this case presents a question of substantial importance which affects the United States and every state. If the Supreme Court of Hawaii is correct, the time-honored legal principle that taxes on the privilege of engaging in interstate commerce and measured by the gross receipts thereof cannot be levied by a state will have been set aside. The states will be free to prevent, through taxation, their citizens and others from engaging in interstate commerce. The correctness of the Supreme Court of Ha-

waii's ruling in this regard can be settled only by a decision of this Court.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

DATED: Honolulu, Hawaii, December 17, 1965.

Respectfully submitted,

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